LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
FEB 16 1972
E. ROBERT SEAVER, CLERK

No. 71-845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

MARTIN OIL SERVICE, INC.,

Petitioner,

vs.

ILLINOIS DEPARTMENT OF REVENUE,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MAYER, BROWN & PLATT

MARK H. BERENS
WM. BRUCE HOFF, JR.
WILLIAM A. GORDON
231 South La Salle Street
Chicago, Illinois 60604

February 11, 1972

BORG/CHICAGO, U.S.A.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-845

MARTIN OIL SERVICE, INC.,

Petitioner,

vs.

ILLINOIS DEPARTMENT OF REVENUE,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Martin recognizes that it is not customary to file a reply brief in support of a Petition for a Writ of Certiorari. However, in view of the confusion engendered by Respondent's brief in opposition thereto, Martin feels compelled to submit this short statement of clarification.

At the outset, issue must be taken with Respondent's assertions that Martin has misstated and omitted "material" facts in its Petition to this Court (Resp. Br., pp. 1-2). In each instance, Respondent is unjustified in its assertion, and is erroneous in treating the matters discussed as if they were relevant to the issue before this Court.

Specific note should be taken of Respondent's prime objection to Martin's statement that it is required to remit Federal gasoline tax on gasoline it sells *at retail*. Since almost all of Martin's sales of gasoline are "at retail", and since this is the point in time when the Federal gasoline tax must be remitted to the Internal Revenue Service, it is difficult to comprehend how Martin's statement was misleading, or what else Martin could have said.

Respondent's legal arguments also bear very little relation to the substance of this litigation. As indicated in its Petition, Martin is asking this Court to construe a Federal statute so as to reconcile conflicting interpretations heretofore reached by a number of state supreme courts. The sole issue presented is whether the legal incidence of the Federal gasoline tax is on the consumer or the manufacturer. For it is only after that Federal question is resolved that the state courts can determine whether Federal gasoline tax proceeds must be included in "gross receipts" for state sales, use, or gross income tax purposes. The arguments raised by Respondent in its brief do not help resolve that issue.

For example, at pp. 3-5 of its brief, Respondent argues that this case is not governed by the legal incidence of the Federal gasoline tax, but that the decision below rested on independent state law issues. This simply contradicts the Illinois Supreme Court opinion, which reveals, unequivocally, that that Court treated the Federal question raised here as decisive, and based its decision exclusively on its construction of the Federal gasoline tax statute. In citing *People* v. *Werner*, 364 Ill. 594, 5 N.E.2d 238 (1936), the Illinois Supreme Court was not resting its decision on an independent state ground, as Respondent suggests, but was reaffirming its earlier holding that "the legal incidence of the Federal

gasoline tax rested on the producer". (App. 3.) The Illinois court's decision was founded on its interpretation of the Federal statute involved, and that interpretation, which conflicts with decisions rendered by other state supreme courts and which affects taxes in at least 21 other states, should be reviewed by this Court.

Moreover, the cases cited by Respondent at pp. 4-5 of its brief are inapposite. Those cases* all held that no substantial Federal question was presented when the issues raised had been foreclosed by prior decisions of this Court. However, the only prior decisions discussed by Respondent, *Lash's Products Co.* v. *United States*, 278 U.S. 175 (1929) and *Shearer* v. *Commissioner of Internal Revenue*, 48 F.2d 552 (2d Cir., 1931), quite obviously, did not deal with the Federal tax on gasoline and are not controlling here as Respondent suggests. The courts in those two cases did not have to consider the legislative history and specific provisions of the unique tax statutes at issue here, particularly those provisions which provide for a direct refund of taxes to farmers and other off-highway users.**

Respondent's reliance on Treasury Regulations 44, Section 314.0, *et seq.*, at pp. 7-9 of its brief, is similarly mis-

---

* *California Water Serv. Co.* v. *Redding*, 304 U.S. 252 (1938); *Minneapolis, St. P. & S. Ste. M. R. Co.* v. *C. L. Merrick Co.*, 254 U.S. 376 (1920); *Leonard* v. *Vicksburg, S. & P. R. Co.*, 198 U.S. 416 (1905).

** *Biddle* v. *Commissioner*, 302 U.S. 573 (1938), cited by Respondent at p. 5 of its brief, is also irrelevant inasmuch as the issue decided there was whether an American shareholder of an English company was entitled to a foreign tax credit for the standard British income tax paid by the English corporation.

placed. All those Regulations do is restate what is already obvious from Sections 4081 and 4082 of Title 28, U.S.C., that the Federal gasoline tax attaches upon sale or use of gasoline by the producer, and that the producer is required to remit the tax proceeds to the Internal Revenue Service.* Nowhere do the Regulations answer the critical question posed in this Petition: on whom does the legal incidence of the Federal gasoline tax fall? Martin has conceded throughout this litigation that the producer has been selected by Congress to be the administrative conduit through whom the tax is to be remitted, and that the tax must be remitted whenever gasoline is used by a producer or sold by him to a non-producer. However, in view of the fact that refunds are made by the Federal government directly to consumers, and upon consideration of the legislative commentary declaring the Federal gasoline levy to be a "user" tax, Martin contends that the producer is merely an agent for collection of the tax while

---

* Revenue Ruling 59-366, 1959-2 Cum. Bull. 418, cited by Respondent at p. 9 of its brief, is also inapplicable. When correctly read, that Ruling merely prescribes the date upon which a Quarterly Federal Excise Tax Return will be deemed filed for statute of limitations purposes. Clearly, it has no effect whatsoever on the legal incidence of the Federal gasoline tax.

the consumer bears the legal incidence thereof. This argument is in no way affected by the Treasury Regulations cited by Respondent.

Respectfully submitted,

MARK H. BERENS
WM. BRUCE HOFF, JR.
WILLIAM A. GORDON

231 South La Salle Street
Chicago, Illinois 60604
(312) 782-0600

Counsel for Petitioner

MAYER, BROWN & PLATT
Of Counsel